Part Two: Advanced Issues in Asylum, Withholding, and CAT

Thursday, October 19, 2017
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

AGENDA

This session will provide a more in depth discussion of specific refugee topics touched on in Part I of this training, with the goal of further fleshing out some of the nuanced and in-depth issues pertaining to asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). In particular, it will provide a more in depth discussion of: (1) standard of review issues arising in asylum, withholding of removal, and CAT claims; (2) the firm resettlement, particularly serious crime, and terrorist bars to asylum, withholding of removal, and CAT; and (3) recent Board and Circuit Court precedent affecting all three types of claims.

Specifically, the session will discuss both straight forward and nuanced standard of review issues. It will also provide a detailed overview of the firm resettlement, particularly serious crime, and terrorist bars. The session will explore exceptions to the firm resettlement bar, who has the burden of proof for establishing that the bar applies, and the 4-step analysis in *Matter of A-G-G-*. The session will further discuss the application of the particularly serious crime bar, including where the applicant has committed a crime that is not per se particularly serious. Finally, the presentation will explore the 3 tiers of terrorist organizations, the knowledge exemption to the terrorist bar, and what constitutes material support.

Recent Board cases discussed will include *Matter of R-K-K-* (dealing with inter-proceedings similarities), *Matter of J-R-R-A-* (dealing with competency and credibility), *Matter of M-A-F-* (dealing with new applications), and *Matter of D-M-C-P-* (dealing with abandoned applications). Recent federal circuit court cases will include *Gaye v. Lynch* (6th Cir.), *Reyes v. Lynch* (9th Cir.), *Cruz v. Sessions* (4th Cir.), *Bringas-Rodriquez v. Sessions* (9th Cir.), *Barahas-Romero v. Lynch* (9th Cir.), and *Iruegas-Valdez v. Yates* (5th Cir.).

LEARNING OBJECTIVES

By the completion of this session, attendees should be able to:

- Identify the appropriate standard of review applicable to specific issues and elements arising in asylum, withholding of removal, and CAT claims and discuss the more nuanced issues in applying standard of review;
- Discern the more complicated aspects of the firm resettlement, particularly serious crime, and terrorist bars to asylum, withholding of removal, and CAT, and discuss the application of the bars; and
- Discuss recent Board and federal circuit court case law affecting asylum, withholding of removal, and CAT claims, as discussed in the presentation.

11:35 – 11:45 a.m. **New Circuit Court Precedent**

Speaker: Karen Hope
Attorney Advisor
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice

11:45 – 11:55 a.m. **Panel Discussion and Summary**

Speaker: Chuck Adkins-Blanch
Vice Chairman
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice

Speaker: Karen Hope
Attorney Advisor
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice

11:55 – 12:00 p.m. **Break** *(No CLE Requested)*

12:00 – 12:15 p.m. **Board Discussion – BIA Only** *(No CLE Requested)*

Asylum, Withholding and Convention Against Torture

October 10

2017

This outline is a companion to the training on asylum, withholding and Convention Against Torture provided by Charles Adkins-Blanch, Vice Chairman of the Board of Immigration Appeals, and Karen Hope, Staff Attorney at the Board of Immigration Appeals. It is also a reference guide; the authors' views expressed herein do not necessarily represent the views of the Board of Immigration Appeals, the Executive Office for Immigration Review, or the Department of Justice.

I. Background and Sources of Law

A. Sources of Law

1. **Refugee Act of 1980**

2. **Federal Circuit Court and Supreme Court decisions**

3. **BIA precedent decisions**

4. **Regulations at 8 C.F.R. §§ 1208.1 to 1208.31**

5. **UNHCR Handbook**

B. What is a "refugee?"

INA § 101(a)(42)(A) – defines a refugee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(B) – provides that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.

1. The statute superseded *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (holding that China's one-child policy is not facially persecutory and does not create a well-founded fear of persecution on account of an enumerated ground).

2. *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) (holding that section 101(a)(42) of the Act does not confer automatic or presumptive refugee status on a spouse of a person who has been subjected to a forced abortion or sterilization).

    a. However, a person may establish he qualifies as a refugee on account of a well-founded fear of persecution because he will be subjected to forced sterilization

B. Substantive Changes to Asylum and Withholding of Removal

1. Nexus is "at least one central reason" for fear of persecution—INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). **NOTE**: *Barajas-Romero v. Lynch*, 846 F.3d 351, 358-60 (9th Cir. 2017) (aliens requesting W.o.R. need only demonstrate that one of the five protected grounds was or will be "a reason" for the persecution.

2. Credibility determination—new "totality of the circumstances" standard—INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

   a. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. INA § 208(b)(1)(B)(iii).

   b. Inconsistencies need not "go to the heart of" applicant's claim. Although any discrepancy may be considered, material inconsistencies are given more weight in the "totality of the circumstances" analysis.

   c. Circuit courts have addressed the potential application of the legal doctrine *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") after the passage of the REAL ID Act. *See, e.g., Quezada-Caraballo v. Lynch*, 841 F.3d 32, 33 (1st Cir. 2016). There is a circuit split regarding whether the doctrine applies in the context of the REAL ID Act. *Compare Quezada-Caraballo v. Lynch, supra, and Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) *with Kadia v. Gonzales*, 501 F.3d 817, 821-22 (7th Cir. 2007). There is a further circuit split regarding whether the Board, in addition to Immigration Judges, may also use the doctrine in making credibility determinations regarding evidence presented to the Board. *Compare Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007) *with Shouchen Yang v. Lynch*, 822 F.3d 504, 508-09 (9th Cir.

the applicant's testimony, and in particular, to develop it in accord with the *Abdulai* steps.").

Notice Not Required:

- **Seventh Circuit:** The language of the REAL ID Act puts respondents on notice because it "clearly states" that corroborative evidence may be required. *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); *see also Darinchuluun v. Lynch*, 804 F.3d 1208 (7th Cir. 2015); *Abraham v. Holder*, 647 F.3d 626, 633 (7th Cir. 2011). Note that corroborating evidence will not be required if the applicant does not have, and cannot reasonably obtain the evidence. *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015) (holding corroboration to be unreasonable where those needed to provide it were indifferent, had been threatened not to assist, or lacked personal knowledge, and where country reports, if provided, would at most prove only that the claim was plausible).

- **Second Circuit:** "The alien bears the ultimate burden of introducing such evidence without prompting from the IJ." *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009) (Pre-REAL ID). *But see Yan Juan Chen v. Holder,* 658 F.3d 246, 253 (2d Cir. 2011) (noting that "importantly" the IJ "identified the necessary corroborating evidence nine months in advance of [the respondent's] hearing, allowing her an opportunity to secure [the evidence] or explain why it was not available") (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 112 (2d Cir. 2006) (Pre-REAL ID)).

- **BIA follows 2d and 7th Circuits**—in *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board held that an IJ should consider an applicant's explanations for not providing corroborating evidence and, if a continuance is requested to obtain such evidence, he should determine whether there is good cause to continue proceedings; however, an IJ is not required to continue proceedings or even identify what specific evidence is necessary to meet the respondent's burden of proof. The Seventh Circuit's decision in *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015), cited the Board's decision in *Matter of L-A-C-*.

- **Sixth Circuit**: In an opinion issued after *Matter of L-A-C-*, *supra*, the Sixth Circuit agreed with the Seventh Circuit and disagreed with the Ninth Circuit that the Act does not entitle an alien to any notice of what sort of corroborating evidence the alien must produce to carry his burden. *See Gaye v. Lynch*, 788 F.3d 519, 528-30 (6th Cir. 2015).

3. Applicant's residence in another country prior to applying for asylum. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (citing *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006)).

4. Nature of applicant's criminal activities, family ties, employment history, etc.

5. Applicant's intent in making a false statement – i.e., whether the fabrication was knowing or deliberate. *Matter of Y-L-*, 24 I&N Dec. 151, 159 (BIA 2007); *Flores v. Holder*, 699 F.3d 998, 1004 (8th Cir. 2012).

6. Motivations of persecutor. *Matter of D-R-*, 25 I&N Dec. 445, 453 (BIA 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 127-28 (4th Cir. 2011).

7. Content of foreign law. *Matter of A-G-G-*, 25 I&N Dec. 486, 505 n.19 (BIA 2011).

8. Whether an asylum applicant could safely relocate internally. *See Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1311 (11th Cir. 2013); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008).

    a. Ninth Circuit has not determined whether internal relocation is a legal or factual question, citing conflicting Board precedent in *Matter of D-I-M-* and *Matter of A-S-B-*. *See Brezilien v. Holder*, 569 F.3d 403, 413 (9th Cir. 2009). However, *Brezilien* was issued prior to the Board's recent holding in *Matter of Z-Z-O-*, which overruled *Matter of A-S-B-*.

9. Whether a government is unable or unwilling to protect. *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

10. Whether a person had knowledge of something. *See Matter of D-R-*, 25 I&N Dec. 445, 454-55 (BIA 2011) (affirming the IJ's finding that the applicant knew or should have known that captured Bosnian Muslims would face mass execution or a similar fate).

11. Whether terrorist acts were authorized by an entity's leaders for purposes of determining whether an entity if a Tier III terrorist organization.

    a. The Third Circuit held that "as long as an agency finds as a matter of fact that the allegedly terrorist acts were authorized by [BNP] party leaders, we will accept that finding as long as it is supported by substantial evidence." *Uddin v. Att'y Gen.*, No. 17-1056, 2017 WL 3881965 at *7 (3d

7. Whether extraordinary circumstances excuse a delay in filing an asylum application. *See Husyev v. Mukasey*, 528 F.3d 1172, 1178-79 (9th Cir. 2008) (finding that the issue of extraordinary circumstances presents a question of law where the issue is whether established facts satisfy the legal standard).

8. Whether a government official will acquiesce to the harm that the applicant will suffer. *See, e.g.,*

9. Whether an applicant has established a basis for humanitarian asylum based on the severity of past persecution. *See Matter of N-M-A-*, 22 I&N Dec. 312, 325-26 (BIA 1998) (After a determination of past persecution has been made, the "compelling reasons" legal standard is applied to determine whether severe past persecution under 8 C.F.R. § 208.13(b)(1)(iii)(A)).

10. Whether an applicant has engaged in the persecution of another. *See Quitanilla v. Holder,* 758 F.3d 570, 577 (4th Cir. 2014) ("In assessing the applicability of the persecutor bar, we accept the lJ's factual determinations. Our review of the final BIA decision is thus limited to the issue of whether, under the facts found...by the IJ, [the respondent] assisted or otherwise participated in the persecution of individuals."); *Suzhen Meng v. Holder*, 770 F.3d 1071, 1073 (2d Cir. 2014) ("We apply de novo review, however, to questions of law, including whether an alien's conduct could render her a "persecutor" as that term is statutorily defined.").

D. Mixed Questions of Law and Fact – Example

1. Government acquiescence. *See e.g. Myrie v. Att'y Gen.*, 855 F.3d 509 (3d Cir. 2017). *But see, e.g., Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008) (holding that government acquiescence is a finding of fact, which the circuit court reviews for substantial evidence); *Zheng v. Ashcroft,* 332 F.3d 1186 (9th Cir. 2003) (discussing the interpretation of the term "acquiescence" in 8 C.F.R. § 208.18).

3. Protected grounds—Race, religion, nationality, particular social group, and political opinion. These grounds are discussed further in the "Highlights of Caselaw" section of this outline. Note: All grounds may be imputed. *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).[3]

4. Nexus requirement—Persecution must be "on account of" a protected ground.

    a. Under the REAL ID Act, the respondent must show that the protected ground is "one central reason" for the persecution. REAL ID Act of 2005, §§ 101(a)(3), 101(c).

    b. Political opinion: Persecution must be on account of the *victim's* political opinion, not the persecutor's. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

    c. The Board has held that a persecutor's motive is a matter of fact (i.e. subject to clear error review). *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

5. "Unable or unwilling to control"—Persecution must be inflicted by either a government actor or a private actor whom the government is unable or unwilling to control. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980) (clarifying that a government's "difficulty" controlling a private actor does not equate to the government's inability to do so).

    a. Common examples of non-governmental actors: gangs, common criminals, militias or other non-regular forces, guerillas or other rebel groups, violent religious or sectarian organizations, particularly powerful individuals.

    b. Constructing one standard definition for the terms "unable" and "unwilling" has been challenging. *See Urbina-Dore v. Holder*, 735 F.3d 952, 954 (7th Cir. 2013) ("The Board has used the 'unwilling or unable to control' formula since 1964 yet has never attempted to quantify just how far a nation may depart from perfect law enforcement without being deemed complicit in private crimes.").

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[3] In *Lkhagvasuren v. Lynch*, 849 F.3d 800, 803 (9th Cir. 2016), the Ninth Circuit assumed without deciding that the *Matter of N-M-* framework may be applied for the purpose of identifying whether an applicant has established the requisite factual nexus between any purported political whistleblowing and actual persecution as those terms are defined in the REAL ID Act. In doing so, the Ninth Circuit held that the alien failed to establish that whistleblowing against his employer amounted to persecution.

h. Unwillingness to intervene - *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007) - The Second Circuit remanded to the Board to consider testimony that several days after alien's kidnapping by the FARC, she filed a complaint with local authorities, but they did not give her complaint "much importance" because she was "just a civilian person" and also a country conditions report that the government, "[w]ith the stated goal of furthering peace talks," had allowed the FARC "to maintain control over a Switzerland-sized area" of the country. *Id.* Need to consider evidence that the Columbian government acquiesced to FARC's control over large swath of land and did not investigate her claim.

i. Nexus between a statutorily protected ground and the government's inability or unwillingness to control is not necessary. *Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013). The only nexus requirement is that the actual persecutors, whether governmental or nongovernmental, act on a protected ground.

j. The arrest of an actor for acts unrelated to the persecution at issue is insufficient to demonstrate willingness to protect. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 952 (4th Cir. 2015).

k. Some courts have held that the alien need not report the persecution if doing so would be futile or might subject him to further abuse. *See, e.g., Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013) (holding that the lack of reporting was excusable because the respondent established that police in the Philippines were known to harass gay men and "turn a blind eye to hate crimes"). For other examples that considered that the individual had not contacted the police, *see also Mulyani v. Holder*, 771 F.3d 190 (4th Cir. 2014) (holding that the respondent did not show government inability or unwillingness, as the respondent never notified police or other government officials, and the attackers "did not consider themselves free to assault her with impunity"); *Almutairi v. Holder*, 722 F.3d 996 (7th Cir. 2013) ("[B]ecause he never mentioned the threatening calls to anyone in the Kuwaiti police or military, he could only speculate that the Kuwaiti government might not protect him if he did seek its help."). **NOTE:** *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (overruled its prior decision in *Castro-Martinez v. Holder*, which held that for a past persecution claim in which the alien did not report the harm, the respondent bears the burden to "fill in the gaps" regarding how the government would have responded).

d. Factors to be considered under 8 C.F.R. § 1208.16(e) include reasons for the denial and reasonable alternatives such as family reunification in a third country. In an unpublished decision, the Fourth Circuit indicated the agency needs an "especially compelling reason" to deny asylum as a matter of discretion where withholding has been granted, given the disfavored nature of that status and its barriers to family reunification. *Shantu*, 654 F. App'x at 617.

B. Burden of Proving Past Persecution

1. The applicant bears the burden of proving past persecution. An IJ must make a specific finding as to whether an applicant has established "past persecution." *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

2. If past persecution is established, applicant then has a presumption of a well-founded fear. 8 C.F.R. § 1208.13(b)(1).

3. The respondent's testimony alone may be enough to satisfy the burden. 8 C.F.R. § 1208.13(a).

4. If the respondent fears harm unrelated to past persecution, then the respondent still has the burden. 8 C.F.R. § 1208.13(b)(1).

5. To rebut the presumption, the DHS bears the burden of proving changed circumstances or safe relocation by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

    a. The respondent must be *able* to relocate (substantially better conditions exist in another area than those that would give rise to the well-founded fear of persecution) AND relocation *must be reasonable* under the circumstances. *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); 8 C.F.R. § 1208.13(b)(2)(ii)-(b)(3). The regulations provide a non-exhaustive list of factors, including: ongoing civil strife; administrative, economical, or judicial infrastructure; geographical limitations; social/cultural restraints such as age, gender, health; and social/familial ties.

6. If the DHS rebuts the presumption, then "humanitarian" asylum can be granted in the absence of a well-founded fear of future persecution if:

fear persecution, which may be the case even where the likelihood of persecution is significantly less than clearly probable).[4]

4. "Pattern or practice." 8 C.F.R. § 1208.13(b)(2)(iii)(A) (group of persons similarly situated to the applicant are persecuted on account of one of the five protected grounds);

   Matter of A-M-, 23 I&N Dec. 737 (BIA 2005) (noting that the threat of harm to Chinese Christians in Indonesia by the government, or by forces that the government is unable or unwilling to control, is so systemic or pervasive as to amount to a pattern or practice of persecution") (citing *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005));

   Ye v. Lynch, 845 F.3d 38, 45 (1st Cir. 2017) (noting that the standard for proving a pattern or practice of persecution "requires a showing of regular and widespread persecution creating a reasonable likelihood of persecution of all persons in the group" (citing *Rasiah v. Holder*, 589 F.3d 1, 5 (1st Cir. 2009)).

   Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (finding a pattern or practice of persecuting gay men in Jamaica).

5. "Disfavored group" (Ninth Circuit only)—*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). For more information, *see* Adam L. Fleming, *Organized Atrocities: Asylum Claims Based Upon a "Pattern or Practice" of Persecution*, 7 (no. 3) Imm. L. Advisor 1 (March 2013).

6. Internal relocation: In cases in which the applicant has not suffered past persecution, s/he has burden to prove that s/he cannot avoid persecution by relocating to a different part of the country or that it would be unreasonable to expect him/her to relocate. 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i).

   In cases in which the persecutor is a government or is government-sponsored, it is presumed that internal relocation would not be reasonable, unless the DHS

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[4] *But see Valle-Zometa v. INS*, 921 F.2d 282 (9th Cir. 1990) (unpublished decision) (finding that the Board's reasonable person test, as articulated in *Matter of Mogharrabi*, contradicted the Supreme Court's decision in *Cardoza-Fonseca*).

Holder, 735 F.3d 534 (7th Cir. 2013); *Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303 (11th Cir. 2013); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Turkson v. Holder*, 667 F.3d 523 (4th Cir. 2012); *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Huang v. Att'y Gen. of U.S.*, 620 F.3d 372 (3d Cir. 2010) (asylum); *Kaplun v. Att'y Gen. of U.S.*, 602 F.3d 260 (3d Cir. 2010) (CAT).

The Board follows these circuits and applies a clear error standard in all cases. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015), *overruling Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Note, however, that while *Matter of Z-Z-O-* also overruled *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) with regard to what standard of review to apply to future predictions, it did not disturb the latter case's conclusions regarding the significance of DOS reports and our authority to afford different weight to the evidence from that given by the IJ.

D. Withholding of Removal under section 241(b)(3)

1. Mandatory relief – may not be denied as an exercise of discretion.

2. Clear probability standard—*INS v. Stevic*, 467 U.S. 407 (1984) ("The question under that standard is whether it is more likely than not that the alien would be subject to persecution.") = greater than a 50% chance. **NOTE:** 7th Circuit has rejected "more likely than not" standard and applies "substantial risk/probability" standard in both Withholding under the Act and under the CAT. *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 261-62 (7th Cir. 2017).

3. An applicant still benefits from the presumption of future persecution if he establishes past persecution. To rebut the presumption, DHS bears the burden of proving changed circumstances or safe relocation by a preponderance of the evidence. 8 C.F.R. § 1208.16(b)(1)(i)-(ii).

4. An IJ must enter an order of removal where withholding is granted but asylum is denied. *Matter of I-S- and C-S-*, 24 I&N Dec. 432 (BIA 2008).

5. **NOTE**: A number of circuits and the Board have held that predicting future events that would support a finding of persecution to be more likely than not to occur to the applicant is fact finding and must be reviewed by the Board for "clear error."

that torture was likely to occur in Jamaican prison to applicant with serious mental health issues).

3. Prediction of future events: As with a WFF determination, a number of circuits and the Board have held that the prediction of future events that would support a finding of torture more likely than not to occur to the applicant is fact finding and must be reviewed by the Board for "clear error."

4. Specific intent requirement: Torture must be "specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5).

   a. The Board has interpreted the "specific intent" requirement as "intent to accomplish the precise criminal act that one is later charged with," distinguishing it from "general intent," which commonly "takes the form of recklessness . . . or negligence." *Matter of J-E-*, 23 I&N Dec. 291, 300-01 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft,* 364 F.3d 1013, 1019-20 (9th Cir. 2004).

   b. Circuits that have considered this issue have deferred to the Board's interpretation of the specific intent requirement. *See, e.g., Elien v. Ashcroft,* 364 F.3d 392, 398–99 (1st Cir. 2004); *Pierre v. Gonzales,* 502 F.3d 109, 113-19 (2d Cir. 2007); *Pierre v. Att'y Gen.,* 528 F.3d 180, 189 (3d Cir. 2008) (en banc); *Cherichel v. Holder*, 591 F.3d 1002, 1016-17 (8th Cir. 2010); *Villegas v. Mukasey,* 523 F.3d 984, 988 (9th Cir. 2008); *Cadet v. Bulger,* 377 F.3d 1173, 1190, 1193, 1195 (11th Cir. 2004). *See also Majd v. Gonzales*, 446 F.3d 590, 597 (5th Cir. 2006) (affirming the Immigration Judge's finding that most of the applicant's suffering was not inflicted with the specific intent of the government forces).

5. Acquiescence requirement: Torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1).

   a Acquiescence is defined in the regulations as requiring that the public officials must have been aware of the torture and must breach his or her legal responsibility to intervene. *See* 8 C.F.R. § 1208.18(a)(7).

   b Gov't Actions not Satisfying Breach of Legal Duty
   - Warfare against insurgent groups - *Limani v. Mukasey*, 538 F.3d 25 (1st Cir. 2008).
   - Investigation, arrest, prosecution - *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001)

f Rogue Official

- *Costa v. Holder*, 733 F.3d 13, 14–15, 17–18 (1st Cir. 2013) - The court denied protection under CAT, noting that although there was a high level of police abuse and impunity in Brazil, there were also investigations and prosecutions of corrupt police officers and the government had cracked down on corruption. The court concluded that the evidence did not provide a sufficient basis to overturn the Board's determination that "the actions of two rogue police officers do[] not constitute government action." *Id.* at 18. And the inference that a larger group of officers were willing to help the officers who threatened the alien was not inevitable. *Id.*
  - *Romilus v. Ashcroft*, 385 F.3d 1, 3-4, 9 (1st Cir. 2004).
  - *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004), *amended*.
  - *Suarez-Valenzuela v. Holder*, 714 F.3d 241 (4th Cir. 2013).
  - *Miah v. Mukasey*, 519 F.3d 784, 786-88 (8th Cir. 2008).

- The 7th and 9th Circuits generally do not agree with the Board's characterization of officials as "rogue":

  - *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1183-85 (7th Cir. 2015) - it is irrelevant whether the police are "rogue" in that they are not serving the interests of the Mexican government. An alien need not prove that the Mexican government is complicit in the misconduct of its officers. It is not enough to bar removal that the government is trying, but without much success, to prevent police torturing citizens at the behest of drug gangs.
  - *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1076, 1079-80 (9th Cir. 2015) (rejected gov't's argument that uniformed, on-duty police officers and military officers who assaulted and raped alien were "rogue" officials b/c alien did not show acquiescence by a higher level member of the Mexican government).
  - *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (an applicant can establish CAT eligibility based on actions taken by off-duty police officials ("rogue officials") even if not acting in their official capacity).

g Relevance of a Gov't's ability to control torturers

- *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007) ("[A]lthough a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under the CAT, that inquiry does not turn on a government's 'ability to control' persons or groups engaging

respondent would likely be imprisoned in Jamaica due to his mental illness and would likely suffer physical and mental abuse at the hands of prison guards and inmates because of his mental illness).

- Police Officers: *Zelaya v. Holder*, 668 F.3d 159, 168 (4th Cir. 2012) (discussing that police officers' refusal to help Respondent who was threatened with a gunshot by the MS-13 gang is a breach of the local police's legal responsibility to intervene to prevent severe pain or suffering from being inflicted on the respondent).

- An individual need only show that a state or local official acquiesces, even if the federal government of the country would not acquiesce. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015); *see also Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013).

- With regard to acquiescence, evidence that government has been generally ineffective in preventing or investigating criminal activities is not enough to constitute acquiescence. *See Garcia-Milian v. Holder*, 755 F.3d 1026, 1033-35 (9th Cir. 2014).

- *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 820 (11th Cir. 2004) (holding that the alien did not demonstrate that the harm he suffered was inflicted at the instigation of, or with the consent or acquiescence of, a public official in Somalia because the objective evidence indicated "that Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power").

- *Pavlyk v. Gonzales*, 469 F.3d 1082, 1090 (7th Cir. 2006) (finding that alien had not shown the requisite level of acquiescence where he had been threatened by a private individual, who was not a public official or acting in an official capacity, and could not identify the individuals who shot at him, although he speculated that the police "organized" the shooting). *See also Ishitiaq v. Holder*, 578 F.3d 712, 718 n.3 (7th Cir. 2009) (holding that an alien who had been shot at by Islamist militants had not alleged that the Pakistani government would torture him or acquiesce to his torture as needed for protection under the CAT).

government's 'willful blindness toward the torture of citizens by third parties' amounts to unlawful acquiescence"); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n.3 (8th Cir. 2009) (same); *Mouawad v. Gonzales*, 485 F.3d 405 (8th Cir. 2007) (finding that a "government cross[es] the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties"); *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006); *N.L.A. v. Holder*, 744 F.3d 425, 442 (7th Cir. 2014) (citing the willful blindness standard favorably); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (holding that "*[Matter of] S-V-* was manifestly contrary to the law," and thus "'willful blindness' falls within the definition of 'acquiescence.'"); *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013); *Cruz-Funez v. Gonzalez*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Zheng* and finding that "Congress made its intent clear that actual knowledge, or willful acceptance, is not required for a government to 'acquiesce' to the torture of its citizens"); *Lopez-Soto v. Ashcroft,* 383 F.3d 228, 240 (4th Cir. 2004) ("awareness includes both actual knowledge and willful blindness.") (citing *Zheng,* 332 F.3d at 1194) (quotations omitted); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245-46 (4th Cir. 2013).

- Two Circuits, the First and the Eleventh, have not adopted the "willful blindness" test. The First Circuit has not attempted to define government acquiescence and has so far upheld the Board's determinations on this issue. *See Granada-Rubio v. Lynch*, 814 F.3d 35, 39 (1st Cir. 2016) (appearing to treat acquiescence and "willful blindness" as distinct issues, stating that the alien had "not shown that she will be subject to torture through the acquiescence or willful blindness of a public official"); *Faye v. Holder*, 580 F.3d 37, 42 (1st Cir. 2009). In *Reyes-Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239, 1142 (11th Cir. 2004), the Eleventh Circuit discussed the petitioner's view that it should adopt the Ninth Circuit's willful blindness interpretation, but reasoned that, because the police had investigated the assaults and the government opposed the terrorist group in question, the acquiescence element had not been satisfied.

    - However, recent 1st and 11th Circuit cases have tacitly acknowledged the willful blindness standard. *Gurung v. Lynch*, 618 F. App'x 690 (1st Cir. 2015); *Mendoza-Rodriguez v. U.S. Att'y Gen.*, 405 F. App'x 359 (11th Cir. 2010)

3. Non-physical harm: *psychological harm* may count. *See Tadesse v. Gonzales*, 492 F.3d 905, 912 (7th Cir. 2007) (considering the "lasting psychological damage" of the gang rape that the Eritrean applicant suffered and the fact that she lost all her family in the war as part of persecution analysis and remanding to the Board); *see also Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (distinguishing psychological harm resulting from female genital mutilation that could rise to the level of persecution from "a fear of psychological harm alone" that would not rise to the level of persecution; denying Senegalese applicant's withholding of removal based on psychological harm she would suffer if her 5-year-old daughter was forced to undergo FGM).

4. *He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014)—economic persecution requires "substantial economic deprivation that interferes with the applicant's livelihood."

   NOTE: Board chose not to follow the Ninth Circuit's lower standard of "deliberate imposition of *substantial* economic disadvantage." *See Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *see also He*, 749 F.3d at 796. However, we still apply "substantial economic deprivation" standard in the Ninth Circuit.

5. Incidents, in the aggregate, can rise to the level of persecution as contemplated by the Act. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998); *see also Matter of L-K-*, 23 I&N Dec. 677, 683 (BIA 2004) (finding that the harm the respondent suffered during a "series of home invasions" rose to the level of persecution).

6. *Threats alone* are generally not enough to constitute persecution. *See Lim v. INS*, 224 F.3d 929 (9th Cir. 2000); *Boykov v. INS*, 109 F.3d 413, 416 (7th Cir. 1997).

   a. But, in a small number of cases, threats were found to be past persecution, where threats were of an immediate and menacing nature to cause significant suffering or harm, were imminent or concrete, or were accompanied by some additional evidence of harm to applicant or where other family members were beaten/murdered. *See Javed v. Holder*, 715 F.3d 391, 396 (1st Cir. 2013) (concluding that death threats to Pakistani lawyer based on imputed political opinion rose to the level of past persecution and remanding to the Board); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (finding that three death threats by gang was sufficient for Salvadoran asylum applicant to establish well-founded fear of future persecution and remanding to the Board); *Pathmakanthan v. Holder*, 612 F.3d 618, 623 (7th Cir. 2010) (finding that "[t]hreats alone, and particularly threats of death, can amount to persecution under certain circumstances."); *Zhu v. Gonzales*, 493 F.3d 588, 598 (5th Cir. 2007) (finding that the "threat of a physically compelled abortion or forcible

331 (4th Cir. 1996) (noting the subjective and objective aspects of well-founded fear "necessarily include[] consideration of age," and citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which states "the reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien"); *Garcia-Garcia v. INS*, 173 F.3d 850, 1999 WL 150822 (4th Cir. 1999) (unpublished).

c. Fifth Circuit: Age is not always relevant as to whether a particular act constitutes persecution. *Paz-Caballero v. INS*, 47 F.3d 427, 1995 WL 71383 (5th Cir. 1995) (unpublished) (rejecting a petitioner's assertion that being under the legal draft age transformed his conscription into "persecution.").

d. Sixth Circuit: Age may affect testimony. *See Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (noting that a child may be incapable of articulating his or her fear or testifying in detail about personal matters).

e. Eighth Circuit: Age progression may rebut presumption of a well-founded fear. The Eighth Circuit has held that where a child experienced past persecution, the child's subsequent progression to adulthood may constitute a "fundamental change in circumstances" that rebuts the presumption of a well-founded fear of future harm. *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 653 (8th Cir. 2007); *see also Ming Li Hui v. Holder*, 769 F.3d 984, 985 (8th Cir. 2014).

B. What is not "persecution?"

1. Discrimination—*Fisher v. INS*, 79 F.3d 955, 961–62 (9th Cir. 1996).

2. General violence—*Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).

3. Military recruitment—*Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988).

   But see, e.g., Milat v. Holder, 755 F.3d 354, 361 (5th Cir. 2014) (stating that prosecution for avoiding military conscription may constitute persecution if the penalty imposed would be disproportionately severe on account of a protected ground or the applicant would be required to engage in inhumane conduct as part of the military service).

4. In some cases, substantial economic deprivation—*He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (finding that the respondent did not demonstrate that the "economic deprivation interfered with his livelihood" because he did not provide any evidence of the effect that a government fine had on him).

in those Board decisions. *See, e.g., Paiz-Morales v. Lynch*, 795 F.3d 238 (1st Cir. 2015). However, the Seventh Circuit has issued precedent decisions continuing to treat immutability as the sole requirement without specifically discussing *W-G-R-* and *M-E-V-G-*. The Third Circuit has not issued a precedent decision on this issue since those Board decisions. The Ninth Circuit has clarified the criteria while reserving assessment of their validity. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1082-85 (9th Cir. 2014) (declining to decide whether Board's requirements of social distinction and particularity constitute a reasonable interpretation of PSG).

Examples of PSGs:

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (homosexuals = PSG).

Matter of H-, 21 I&N Dec. 337 (BIA 1996) (sub-clan in Somalia = PSG).

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (young women not yet subjected to FGM as practiced by their tribe who oppose FGM = PSG).

Matter of V-T-S-, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry = PSG).

Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014) (holding that, depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a PSG).

Marikasi v. Lynch, 840 F.3d 281 (6th Cir. 2016) – The respondent was able to escape husband, avoid contact with him, and had support group in her home country, amongst other things. Thus, the respondent did not demonstrate "any religious, cultural, or legal constraints that prevented her from separating from the relationship" or "moving to a different part of that country." *See Matter of A-R-C-G-*, 26 I&N Dec. at 393. As a result, the respondent failed to prove that she could not leave the relationship or relocate.

Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1082 (9th Cir. 2015) - The unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, withholding of removal, or CAT claim.

- *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) ("former gang members who renounce their membership"—lacks particularity and social distinction; deportees also too broad to constitute PSG), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (remanding a case for consideration of whether "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" is a socially distinct group in Honduran society, emphasizing that claims need to be considered on a case-by-case basis).

– Circuit Precedent:

  - Gang Recruitment

    - General opposition to gang membership may lack particularity required to be a PSG. *See, e.g.*, *Paiz-Morales v. Lynch*, 795 F.3d 238, 244 (1st Cir. 2015); *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (rejecting proposed PSG "young Guatemalan men who have opposed the MS-13, have been beaten and extorted by that gang, reported those gangs to the police, and faced increased persecution as a result" due to lack of both particularity and visibility)

      - But where threats were made on the basis of a family connection to an individual who refused to join the gang, the Fourth Circuit found a nexus to a protected ground and remanded the case for further proceedings. *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947-54 (4th Cir. 2015).
      - The Ninth Circuit has determined that the proposed PSG "people opposed to gangs" is immutable. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (remanding for the Board to adequately address social distinction of proposed particular social group).

    - General refusal to be recruited, even when accompanied by threats based on the refusal, may lack particularity and social distinction required to be a PSG. *See, e.g.*, *Juarez Chilel v. Holder*, 779 F.3d 850 (8th Cir. 2015).

- The Seventh Circuit has held that, while current gang members are not members of a PSG for purposes of withholding of removal, *former* gang members may be since they share an immutable characteristic of past membership in the gang. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). The Seventh Circuit noted that there was no per se bar to asylum or withholding of removal for former gang members.

- Although the Fourth and Sixth Circuits have agreed with the Seventh Circuit on whether former gang membership is an immutable characteristic, the First Circuit has disagreed with that determination. *Compare Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (determining that alien's membership in group consisting of former members of gang in El Salvador was an immutable characteristic) *and Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) *with Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (declining to follow the Sixth and Seventh Circuits in reversing the Board's interpretation based on policy grounds and noting that sharing an immutable characteristic is a necessary but not sufficient condition to qualify as a PSG). These aforementioned cases were all decided prior to the Board's issuance of *W-G-R-* and *M-E-V-G-*. Neither the Fourth nor the Seventh Circuit applied *Chevron* deference and both circuits' decisions were based largely on immutability or policy reasons.

- Other circuit courts have accorded *Chevron* deference to what they consider to be the Board's determination that former gang members do not constitute a PSG. *See Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399 (11th Cir. 2016) (noting that Board's determination that "former Mara-18 gang members" is not sufficiently particular based on *Matter of W-G-R-* and the holding that former gang membership was not a cognizable PSG based on *Matter of E-A-G-* was not unreasonable); *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016) (noting that the Board's construction of "particularity" and "social distinction" for social group in which alien seeking relief claimed membership was entitled to *Chevron* deference).

- Since the Board's issuance of *W-G-R-*, the Sixth Circuit has held that the PSG "active and long-term former gang members" in El Salvador lacked social distinction, based on evidence in the

869 (7th Cir. 2009); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005).[6]

- Mixed Motive, Claims in the Fourth Circuit: *Cordova v. Holder*, 759 F.3d 332, 334-39 (4th Cir. 2014) (finding that the Board had not properly considered the alien's evidence that threats he received were motivated by retaliation for his cousin and uncle's membership in a rival gang, and concluding that the recruitment motivation underlying the alien's persecution did not preclude the existence of another central reason—family ties—for that persecution); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017) (applying *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) and determining that alien's PSG of nuclear family ties to husband who she suspected was murdered by his employer with organized crime ties was one central reason for persecution); *Olivia v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) (although a former gang member's failure to pay rent was the immediate trigger for the harm he suffered, "it was [his] status as a former gang member that led MS-13 to demand rent in the first place and to assault him for failure to pay it."); *Zavaleta-Policiano v. Sessions,*.")16-1231, 2017 WL 4314994 (4th Cir. July 26, 2017) (finding that the respondent's familial relationship to her father was at least one central reason gang in El Salvador threatened and extorted her).
- Other Mixed Motive Claims: *Cambara-Cambara v.* Lynch, 837 F.3d 822, 825-26 (8th Cir. 2016) (noting that the applicants "provided no proof that the criminal gangs targeted members of the family because of family relationships, as opposed to the fact that, as prosperous businessmen, they were obvious targets for extortionate demands"); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (concluding that "the evidence that gang members sought information from [the applicant] about her brother, without more,

[6] In February 2016, the Eighth Circuit rejected the following groups: (1) "male, gang-aged family members of murdered gang members" and (2) "male, gang-aged family members of [the alien's] cousin." *See Aguinada-Lopez v. Lynch*, 814 F.3d 924, 926-27 (8th Cir. 2016), *vacated and superseded by Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). However, the Eighth Circuit subsequently vacated its prior opinion and substituted its opinion in *Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). Citing *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005), the Eighth Circuit assumed that the respondent's proposed social groups were cognizable and affirmed the Board's determination for failure to establish nexus. *Id.* at 409.

- *See also Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 504 (3d Cir. 2011), *as amended* (3d Cir. 2012) (finding cognizable the PSG of individuals who testify against gang members); *Crespin-Vallardares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (finding cognizable the PSG of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses).

- *But see* re: political opinion*: Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 88–92 (1st Cir. 2008) (concluding that the mere act of giving a statement to the police or testifying before a grand jury is not an expression of political opinion).

  - Rarely have courts found that informants against gangs = PSG.

- Tattoos - *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (finding that *tattooed youths* was not sufficiently particular to constitute a PSG).

VI. Bars and Exceptions to Asylum and Withholding

A. Bars to Asylum

1. One-year time limit —INA § 208(a)(2)(B) – Applicant must show by clear and convincing evidence that he applied for asylum within a year of his "last arrival" (which may be contested),[7] 8 C.F.R. § 1208.4(a)(2)(ii), or establish an exception:

   a Changed circumstances—in home country or based on activities in the U.S.

   Note: It is important to distinguish between changed circumstances (including changed personal circumstances) that may be sufficient to overcome the one-year bar and changed country conditions sufficient to support a motion to reopen to apply or reapply for asylum and withholding of removal. *Compare*

[7] *See Linares-Urrutia v. Sessions*, 850 F.3d 477 (2d Cir. 2017) (stating that in light of *Brand X, Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), trumps the Second Circuit's case *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), as to the definition of "last arrival" and noting that the meaning of "arrival" and "last arrival" would benefit from clarification by Congress). The Board had rejected the Second Circuit's holding in *Joaquin-Porras* and had held that the term "last arrival" should be given its "natural and literal meaning, i.e., the alien's most recent arrival in the United States from a trip abroad." *Matter of F-P-R-*, *supra*, at 683-84.

regulatory provision operates as an exemption even after the individual is no longer a minor if he or she files an asylum application within a reasonable amount of time.

2. Firm resettlement[8]—INA § 208(b)(2)(A)(vi); 8 C.F.R. § 1208.15

   a. Who has the burden of proof?

      – DHS has initial burden to make a prima facie showing of an offer of firm resettlement by presenting direct evidence of an alien's ability to stay in a country indefinitely.

         o The Federal courts of appeals that have addressed firm resettlement have adopted two approaches: the Third, Seventh, and Ninth Circuits have adopted the "direct offer" approach, and the Second and Fourth Circuits have adopted the "totality of the circumstances" approach.

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[8] The former regulations, repealed in 2001, barred applicants from asylum if they had found a "safe haven" in a third country before applying for asylum in the U.S. *See Tandia v. Gonzales*, 437 F.3d 245, 246 (2d Cir. 2006); former 8 C.F.R. § 208.14(e) (effective January 4, 1995, to April 1, 1997); former 8 C.F.R. § 208.13(d) (effective April 1, 1997, to January 5, 2001).

Occasionally, circuit courts have used the term "safe haven" in reference to the firm resettlement bar under 8 C.F.R. § 208.15. *See, e.g., Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). The Fourth Circuit has suggested, in an unpublished decision, that the Board consider on remand whether "safe haven" is still a viable discretionary factor in light of the repeal of this regulation. *Shantu v. Lynch*, 654 F. App'x 608 (4th Cir. 2016)

The earlier of the two regulations, former 8 C.F.R. § 208.14(e), which was in force from January 4, 1995 until April 1, 1997, stated that

> [a]n application from an alien may be denied in the discretion of the Attorney General if the alien can and will be deported or returned to a country through which the alien traveled en route to the United States and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim in accordance with a bilateral or multilateral arrangement with the United States governing such matter.

However, this earlier regulation had no practical effect because there were no such bilateral or multilateral agreements. *See* 59 Fed. Reg. 62284, 62296 (Dec. 5, 1994); *Tandia*, 437 F.3d at 246 n.2.

The latter of the two regulations, former 8 C.F.R. § 208.13(d), was in force from April 1, 1997, until it was repealed on January 5, 2001. *See* 65 Fed. Reg. 76121 (Dec. 6, 2000). It provided that "an asylum application may be denied in the discretion of the Attorney General if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution," thus removing the requirement for a bilateral or multilateral agreement. *See* 62 Fed. Reg. 10312, 10342 (Mar. 6, 1997); *Tandia*, 437 F.3d at 247.

1) The DHS bears burden of presenting prima facie evidence of offer of firm resettlement. *See* 8 C.F.R. § 1240.8(d). The DHS should first secure and produce direct evidence but may use indirect evidence if direct evidence is unavailable. The evidence has to "indicate" that the mandatory bar to relief "may apply." Direct evidence may include a passport, a travel document, or evidence of refugee status. Indirect evidence may include immigration laws or refugee process in country of proposed resettlement and length of alien's stay in third country. *See Jin Yi Liao v. Holder*, 558 F.3d 152 (2d Cir. 2009 (applying a "totality of the circumstances" approach to determining whether DHS met its burden).
2) Alien can rebut the DHS's prima facie evidence of offer of firm resettlement by showing by a preponderance of the evidence that such offer has not been made or that s/he would not qualify for it. *SeeGonzales,* 421 F.3d 493, 497 (7th Cir. 2005). The burden only shifts to the respondent once DHS has produced sufficient evidence to meet its burden. *Shi Hwa She v. Holder*, 629 F.3d 958, 962 (9th Cir. 2010); *see also, e.g., Tchitchui v. Holder*, 657 F.3d 132, 135 (2d Cir. 2011); *Firmansjah v. Gonzales*, 424 F.3d 598, 602 (7th Cir. 2005); *Abdille v. Ashcroft*, 242 F.3d 477, 491 (3d Cir. 2001).
3) The IJ will consider the totality of the evidence presented by the parties to determine whether alien has rebutted the DHS's evidence of offer of firm resettlement.
4) If IJ finds alien firmly resettled, then burden shifts to alien to establish exception to firm resettlement applies by a preponderance of the evidence. 8 C.F.R. §§ 1208.15(a)-(b).
    a. "Necessary consequence" exception at 8 C.F.R. § 1208.15(a), which states that the individual's entry into that country was a necessary consequence of flight from persecution, he/she remained only as long as necessary to arrange further travel, and did not establish significant ties in that country. *See Ramos Lara v. Lynch,* 833 F.3d 556 (5th Cir. 2016); *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012).
    b. "Restrictive conditions" exception at 8 C.F.R. § 1208.15(b) which provides and exception if the conditions in the individual's residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. *See Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012); *cf. Camposeco-Montejo v. Ashcroft,* 384 F.3d 814 (9th Cir. 2004).

identified by the hospital as fraudulent); *Selami v. Gonzales*, 423 F.3d 621, 626–27 (6th Cir. 2005) (documents provided by the alien were clear forgeries when compared to true copies of the originals); *Barreto–Claro v. U.S. Atty. Gen.*, 275 F.3d 1334, 1339 (11th Cir. 2001) (alien admitted he lied in his prior asylum application).

f. An adverse credibility determination based on discrepancies between alien's account and documentary evidence alone is insufficient to support a frivolous finding. *Wang v. Lynch*, 845 F.3d 299, 303 (7th Cir. 2017).

5. Previous Asylum Application – INA §§ 208(a)(2)(C)-(D)

   a. Where applicant previously applied for and was denied asylum, unless changed circumstances exist which materially affect his/her eligibility for asylum.

   b. Once there is a final order, applicant can only file a motion to reopen, and only under the "changed country conditions" if beyond 90-day MTR deadline.

6. Reinstated removal orders – Aliens with reinstated removal orders are ineligible to apply for asylum – *see e.g., Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Cazun v. Att'y Gen. of U.S.*, 856 F.3d 249(3d Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307 (11th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015); *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010).

B. Bars to Asylum and Withholding

1. Persecutor

   a. INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i) = "ordered, incited, assisted or otherwise participated in persecution" on account of a protected ground.

   b. Evidence: even where IJ makes an adverse credibility finding, the record may contain enough evidence to trigger the persecutor bar. *See, e.g., Munyakazi v. Lynch*, 829 F.3d 291 (4th Cir. 2016) (holding that the respondent, a native and citizen of Rwanda, ordered, incited, assisted, or otherwise participated in persecution of others on account of their Tutsi ethnicity, and thus was statutorily ineligible for asylum and withholding of removal under the persecutor bar, in light of interviews by DHS investigators in Rwanda with survivors of massacre in the respondent's home village indicating that he was present and assisted in the massacre, internal inconsistencies in the

discretion in determining that that the respondent's involvement in a complex scheme to defraud victims of nearly $2 million was a PSC).

NOTE: The Ninth Circuit still treats *Frentescu* as defining the "applicable legal standard" in PSC cases not governed by the aggravated-felony-plus-5-year-sentence or *Matter of Y-L-, A-G- and R-S-R-* presumptions. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015). In circuits other than the Ninth Circuit, you may cite to *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), for the PSC factors.

Once elements of offense bring it within the ambit of a PSC (potentially), then all reliable information may be considered (including, but not limited to the record of conviction and sentencing information)—*Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

d. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), recognized that in some instances, the Board may find some crimes to be PSCs by looking only at the elements of the offense. **HOWEVER**, the Ninth Circuit has rejected this. *See Blandino-Medina v. Holder*, 712 F.3d 1338, 1348 (9th Cir. 2013) (holding that the Board erred in holding that lewd and lascivious acts with a child under 14 years old in violation of Ca. Penal Code § 288(a) is a PSC *per se*).

e. An alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is **NOT** considered in assessing whether the alien was convicted of a "PSC" for immigration purposes. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014).

f. Child pornography may be a PSC, but this is a developing issue. *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012) (considering the nature of the crime and the individual factual circumstances of the conviction in concluding the respondent's state conviction for child pornography was a PSC barring him from withholding of removal), *but see Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015) (concluding that a conviction under the same state statute for child pornography was not an aggravated felony and remanding for further proceedings).

c. Tier III – defined as a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (IV)."
No formal list - e.g., Jammu Kashmir Liberation Front, Oromo Liberation Front, and Eritrean People's Liberation Front. *See e.g. S.A.B. v. Boente,* 847 F.3d 542 (7th Cir. 2017).t

Note: An entity cannot be deemed a Tier III terrorist organization absent a finding that its leaders authorized terrorist activity committed by its members. *See Uddin v. Att'y Gen. of the U.S.*, 870 F.3d 282, 290 (3d Cir. 2017); *Zumel v. Lynch*, 803 F.3d 463, 474 (9th Cir. 2015) (citing approvingly *Matter of S-K-*, 936, 941 (BIA 2006), for that proposition).
For more information as to the tiers of terrorist organizations, *see* Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Designation*, 10 (no. 5) Imm. L. Advisor 1 (June 2016).

3. Who has the burden of proof?

a. The DHS bears the initial burden of proof of showing that the "evidence indicates" that the terrorist bar "may apply." 8 C.F.R. § 1240.8(d); *see Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006); *Budiono v. Lynch*, 837 F.3d 1042, 1047-49 (9th Cir. 2016); *Viegas v. Holder*, 699 F.3d 798, 801-02 (4th Cir. 2012).

Note: In a case interpreting the persecutor bar, the Board has recently interpreted this portion of the regulations to "necessarily create a less onerous standard than the preponderance of the evidence showing" that is required when the respondent has the burden of proof to show the bar does not apply. *Matter of M-B-C-*, 27 I&N Dec. 31, 37 (BIA 2017). So, where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial based on a bar to relief may apply, the burden shifts to the R who then has the burden of proof to prove by a preponderance of the evidence that such grounds do not apply. *Id.*

b. If the DHS meets its burden, then the alien has the burden of showing by a preponderance of the evidence that the terrorist bar does not apply. 8 C.F.R. § 1240.8(d).

alien is eligible for relief and state on the record that such relief would have been granted "but for" the terrorist bar.

7. Note also that the terrorist bar applies retroactively to an alien's material support of a Tier III organization. *See Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014).

VII. Recent Precedent on Asylum and Withholding of Removal

The following examples are cases of evolving or emerging case law. While some of these topics may have previously been covered, the following cases were discussed during the asylum training presentation.

A. Inter-Proceeding Similarities: This occurs when the evidence from one application is substantially similar, or identical, to another application. *See Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015) (holding that the IJ should give the respondent meaningful notice of the similarities that are considered to be significant; provide the respondent a reasonable opportunity to explain the similarities; and consider the totality of the circumstances in making the credibility determination); *Wang v. Holder*, 824 F.3d 587 (6th Cir. 2016) (holding that where the IJ notified the respondent of the similarities between his and two other asylum applications and gave him an opportunity to explain them, but he did not, the respondent could not claim that his failure to explain the similarities resulted from a lack of notice or from a lack of other procedural safeguards).

Factors that make similarities more significant may include:
1. A large number of similarities;
2. Identical elements; and
3. Inclusion of additional non-essential material in both statements.

Possible explanations for similarities may include:
1. Mere coincidence;
2. Use of standardized templates;
3. Use of the same translator/transcriber; or
4. The respondent was an innocent victim of plagiarism by another person.

See also Barragan-Ojeda v. Sessions, 853 F.3d 374 (7th Cir. 2017) (upholding BIA's reliance on *M-A-F-* in rejecting the alien's argument of imputed sexual orientation, and thus, no new application).

D. Abandoned Applications:

1. Abandonment based on biometrics noncompliance: *See Matter of D-M-C-P-*, 26 I&N Dec. 644 (BIA 2015) (holding that an asylum applicant must receive proper notice on the record of the biometrics requirements, which includes: (1) advising the applicant on the record of need to provide biometrics and instructions submitting information; (2) informing the applicant of the deadline for complying with the biometrics requirements; and (3) informing the applicant of the consequences of noncompliance, including possibility of abandonment).

2. Abandonment based on untimely application: *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992) (noting that the "Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them); *Matter of Islam*, 25 I&N Dec. 637, 642 (BIA 2011) (determining that an incomplete application is treated as untimely filed).

3. Abandonment based on untimely documents: *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010); *Matter of E-F-H-L-*, 26 I&N Dec. 319, 323 (BIA 2014). *Compare Casares-Castellon v. Holder*, 603 F.3d 1111, 1113 (9th Cir. 2010) (noting that the plain language of 8 C.F.R. § 1003.31(c) does not permit deeming timely filed application abandoned for failure to file supplemental documents within specified time) *with Bropleh v. Gonzales*, 428 F.3d 772, 779 (8th Cir. 2005) (concluding that the applicant abandoned his adjustment application by failing to present any evidence in support of his application) .

E. The Use of Overseas Investigation Reports as Evidence: *See Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015). The Ninth Circuit reaffirmed its position as the sole circuit on the side of a split concerning the use of overseas investigation reports as fact-checking mechanisms in asylum cases, by denying the petition for hearing en banc from *Angov v. Holder*, 736 F.3d 1263 (9th Cir. 2013). The circuits are split over whether these reports, which are often short on details, are prepared for the purpose of litigation, and do not contain the identity of the preparer, are admissible as evidence against an asylum seeker. The Third, Fourth, Sixth, and Eighth Circuits have found the reports are inadmissible because they violate an alien's right to due process.

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I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Part 2, Advanced Issues in Asylum, Withholding, & CAT**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____